costs thereof to be taxed on the ground that the amount of fixed costs would be inadequate he would have, I think, succeeded but only or largely because the prescribed amounts have not been revised since June 1980 and the court should not ignore the fact that the value of money has fallen since 1980.

In my judgment, in respect of the instant case, to allow anything more than about RM2,000 for "getting up" in respect of the O. 14 proceedings is to completely lose sight of what the Rules Committee has prescribed in the appendices to the Rules of High Court and to the Subordinate Courts Rules as its opinion of what should be adequate costs. For the appeal from the Senior Assistant Registrar's decision on the O. 14, while there will be a duplication of the "getting up" the solicitors will have to refresh their minds on the issues and on the facts and the law and will also have to look at it from a perspective that is somewhat different from that of presenting the case to the court of first instance. I would have allowed RM1,500 as "getting up" for the appeal. The learned Registrar does not appear to have made a distinction between the position that obtains at the O. 14 stage and at the trial stage. In any event the amount he has allowed is so obviously wrong and it follows that I have to interfere with his decision.

Accordingly in respect of No. 28 at page 4 of the Bill of Costs, item 26, Appendix 1 to O. 59, I tax off a further RM10,000 to allow only RM2,000 and in respect of No 58 at page 7 of the Bill of Costs, item 27 of Appendix 2, I tax off a further RM6,500 to allow RM1,500. The allocatur or certificate of the Senior Assistant Registrar shall be amended accordingly. As to the costs of the review, I fix it at RM250 to include *inter alia* costs for drawing objections to decisions of Registrar, for drawing, issuing and filing of service of the summons to attend before the Judge for the review, for attending at the hearing of the review and "getting up" the objections and for the review.

KWONG KUM SUN CHAN (M) SDN. BHD.

v.

SELANGOR PROPERTIES BERHAD

HIGH COURT, KUALA LUMPUR
DATO' V.C. GEORGE J.
[SUIT NO. C 2715 OF 1985]
9 JULY 1993

PRACTICE & PROCEDURE: Order 20 r. 5 RHC - Application to amend statement of claim - Addition of new cause of action after expiry of limitation period - Whether permissible - Whether new cause of action distinct from original cause of action.

CONTRACT: Claim for damages - Defendants breaching undertaking to replace existing agreement with two separate agreements - Defendants contending existing agreement rescinded and new agreement entered into between parties - Allegation that plaintiffs breached new agreement - Defendants accepting plaintiffs' repudiation - Plaintiffs denying repudiation - Plaintiffs contending acceptance of alleged repudiation by defendants wrongful.

The plaintiffs' claim was for damages for breach by the defendants of its express undertaking to replace the existing written agreement between the parties in respect of certain building works in Damansara, Kuala Lumpur, with two separate agreements, one for the supply and installation of aluminium products and the other for glass products, containing the same terms as in the existing agreement.

In their statement of defence, the defendants denied the plaintiffs' claim and stated that the original agreement had been rescinded by the parties and that a new agreement had been entered into as evidenced by a letter dated 10 August 1984. The terms and conditions of the new agreement was *inter alia* that the 5mm glass to be supplied, chargeable to the defendants at RM3.60 per sq. ft., had to be of Pilkington origin and had to be imported from the United Kingdom with evidence of such importation to be provided to the defendants. In breach of the new agreement the plaintiffs allegedly unilaterally increased the cost of the glass to RM4 per sq. ft. and refused to provide the defendants with evidence of importation of the glass from the United Kingdom. The defendants allegedly accepted the plaintiffs' breach as repudiating the new agreement. The plaintiffs denied the defendants' allegations and contended that there was

no repudiation on their part and further that the acceptance of the alleged repudiation by the defendants was wrongful.

The trial of the action commenced but after Counsel for the defendants had submitted, Counsel for the plaintiffs in replying applied on 3 July 1993 to amend the statement of claim, in effect, to incorporate what was averred to in the reply in response to the averments in the statement of defence and to add that that had caused the plaintiffs loss and damage.

Held:

[1] The relief claimed was only for damages in respect of the breach of undertaking to enter into the two new agreements on the agreed terms. The further claim for damages was in respect of the wrongful repudiation of the new agreement that had been entered into by the defendants. The plaintiffs could have sued on the alleged breach of undertaking or on the alleged wrongful repudiation or on both of those causes. It chose to sue only on one of the two available causes. Now that limitation had set in, unless the plaintiffs could come squarely within O. 20 r. 5(5) of the Rules of the High Court 1980, it was precluded from seeking the Court's indulgence to allow it to amend the statement of claim so as to bring in the new cause of action.

[2] The pleadings read with the testimony of the witnesses and of the documents produced showed that the facts from which the alleged breach of undertaking arose could not be and were not the facts from which the alleged wrongful repudiation could or did arise. The parties were talking of two matters, no doubt related matters but distinct and separate from each other, one being the alleged breach of the undertaking to enter into the two new agreements and the other the alleged wrongful repudiation of one of the agreements entered into. No doubt the statement of defence made reference to the alleged breach and the reply to the alleged wrongful repudiation by the defendants but it could not by any stretch be implied that the plaintiffs were from the inception of the writ also claiming for damages suffered by the alleged wrongful repudiation of the new agreement. It could not be said that all the plaintiffs was applying to do was to make explicit what was implicit.

[Application to amend statement of claim refused. Costs of the application to be paid by plaintiffs].

Case referred to:
Virginia Rhea [1985] 2 MLJ 1 ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 20 r. 5(1), (2), (3), (4), (5)

For the plaintiff - Y.M. Raja Aziz Addruse (S.L. Chee with him); M/s. Syed Alwi Ng & Teoh
For the defendant - D.P. Naban (Saidah Rastam with him); M/s. Skrine & Co.

JUDGMENT

V.C. George J:

This judgment is in respect of the application made in Open Court on the 3rd July 1993 by Counsel on behalf of the plaintiffs to amend the statement of claim by adding what in effect appears to be a new cause of action.

The plaintiffs' claim is for damages. The statement of claim was filed on or about 23 May 1985. The cause of action set out in the statement of claim was the breach by the defendant developer of its express undertaking to replace the existing written agreement between the parties for the plaintiffs to supply, fabricate and instal certain aluminium "panels and grilles and sections" and to supply, cut and instal certain glass products, using 5 mm glass and 10 mm glass as specified, in respect of certain building works in Damansara, Kuala Lumpur, with two separate agreements, one for the aluminium products and the other for the glass products, the separate agreements in relation to the respective products concerned were to have the same terms as set out in the existing agreement. The alleged breach is elaborated in the statement of claim to be (i) in respect of the aluminium products, the refusal to enter into any separate agreement and (ii) in respect of the glass products, purporting to enter into a separate agreement but not on the same terms as those specified in the original agreement.

By the statement of defence the defendants have denied the alleged undertaking, denied the breach thereof and denied the alleged loss and damages. The statement of defence goes on to state that the original agreement was rescinded by the parties and that a new agreement was thereafter entered into between the parties contained in or evidenced by a letter dated 10 August 1984. It was further stated that "*inter alia*" the terms and conditions of the new agreement was that the 5 mm glass to be supplied had to be of Pilkington origin and had to be imported

from United Kingdom and evidence of such importation had to be provided to the defendants. The defendants were to be charged RM3.60 per sq.ft. for the 5mm glass.

The defence goes on to contend that in breach and in repudiation of the new agreement the plaintiffs unilaterally increased the cost of the glass to RM4 per sq.ft. and had refused to provide the defendants with evidence of importation of the glass from United Kingdom. The defendants, it was alleged, accepted the alleged said breaches by the plaintiffs as repudiating the new contract.

There was a reply by which the plaintiffs join issue with the defendants on the defence and say that at no material time did they refuse to provide evidence of importation, there was no repudiation as alleged and that the purported acceptance of the alleged repudiation by the defendants of the contract was a wrongful repudiation of the contract by them.

The action was set down for trial on 28 May 1986. It was fixed for trial from 14 March 1988 to 16 March 1988. However, one of the parties had it adjourned because an important witness had to go overseas. Eventually the trial commenced on 26 July 1990. A number of witnesses testified in open court. Because of the illness of an important witness the trial was protracted. After each party had closed its respective case Counsel began closing submissions. It was in replying to the submission by En. D.P. Naban of Counsel for the defendants that Raja Aziz Addruse of Counsel for the plaintiffs said that he was obliged to apply to amend the statement of claim.

In effect the plaintiffs appear to want to incorporate into the statement of claim what was averred to in the reply in response to the averments in the statement of defence that the plaintiffs had breached the new agreement and had accepted the breach as a repudiation of the agreement i.e. that the purported repudiation was a wrongful repudiation. The plaintiffs want to add that that had caused the plaintiffs loss and damage.

Looking at the statement of defence and the reply it would seem to appear that whether there was a breach of the new agreement that amounted to a repudiation and whether the acceptance of repudiation of the agreement by the defendants itself amounted to a wrongful repudiation were put in issue in this trial. Certainly a fair amount of the testimony of witnesses and the production of a number of the documentary exhibits was in respect of that issue.

However, En. D.P. Naban of Counsel for the defendants says that he saw the testimony lead on that aspect of the case as being relevant only in respect of damages and not in respect of liability. He also submits that the fact that the statement of defence may have pleaded to matters not relevant to the averments in the statement of claim does not have the effect of changing the character of the statement of claim. En. Naban provided some emphasis for the point made by saying that if liability turned on a finding to be made in respect of the new agreement i.e. whether it was breached, whether there was repudiation of it and was such repudiation wrongful, then his approach towards the testimony adduced including cross examination of the witnesses would have been significantly different from the approach he had in fact taken.

Now, in effect this is an application to add a new cause of action in the statement of claim after the period of limitation in respect of it had expired. Order 20 r. 5 with particular reference to sub-rule (5) thereto has to be looked at:

> 5.(1) Subject to the following provisions of this Rule, the Court may at any stage of the proceedings allow the plaintiff to amend his writ, or any party to amend his pleading, on such terms as to costs or otherwise as may be just and in such manner (if any) as it may direct.
>
> (2) Where an application to the Court for leave to make the amendment mentioned in paragraphs (3), (4) and (5) is made after any relevant period of limitation current at the date of issue of the writ has expired, the Court may nevertheless grant such leave in the circumstances mentioned in that paragraph if it thinks it just to do so.
>
> (3) An amendment to correct the name of a party may be allowed under paragraph (2) notwithstanding that it is alleged that the effect of the amendment will be to substitute a new party if the Court is satisfied that the mistake sought to be corrected was a genuine mistake and was not misleading or such as to cause any reasonable doubt as to the identity of the person intending to sue or, as the case may be, intended to be sued.

(4) An amendment to alter the capacity in which a party sues (whether as plaintiff or as defendant by counterclaim) may be allowed under paragraph (2) if the capacity in which, if the amendment is made, the party will sue is one in which at the date of issue of the writ or the making of the counterclaim, as the case may be, he might have sued.

(5) An amendment may be allowed under paragraph (2) notwithstanding that the effect of the amendment will be to add or substitute a new cause of action **if the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the action** by the party applying for leave to make the amendment.
(Emphasis provided).

In an admirable analysis of the sub-rules of O. 20 r. 5 Lai Kew Chai J. speaking for the Singapore Court of Appeal in the *Virginia Rhea* [1985] 2 MLJ 1 at page 2 of the report concluded by summarising the position:

> ...In other words, the matters of identity, capacity or cause of action as already asserted or implied, from the inception of the writ or the filing of the pleading and it is merely a matter of correction to make explicit what is implicit.

The relief claimed for in the statement of claim in the instant action was for damages only in respect of the breach of undertaking to enter into the two new agreements in the agreed terms. The relief now sought to be added as a further claim for damages is in respect of the wrongful repudiation of the new agreement that had been entered into by the defendants but allegedly not in the terms on which it had been agreed it would be entered into.

The plaintiffs could have sued on the alleged breach of the undertaking or on the alleged wrongful repudiation or on both of those causes. It chose to sue only on one of the two available causes. Now that limitation has set in, unless the plaintiffs can come squarely within O. 20 r. 5(5) it is precluded from seeking the Court's indulgence to allow it to amend the statement of claim so as to bring in the new cause.

In my judgment the pleadings read with the testimony of the witness and of the documents produced show that the facts from which the alleged breach of undertaking arose cannot be and are not the facts from which the alleged wrongful repudiation can or did arise. We are talking of two matters, no doubt related matters but distinct and separate from each other, one being the alleged breach of the undertaking to enter into the two new agreements and the other the alleged wrongful repudiation of one of the agreements entered into. No doubt the statement of defence makes reference to the alleged breach and the reply to the alleged wrongful repudiation by the defendants but it cannot by any stretch be implied that the plaintiffs were from the inception of the writ also claiming for damages suffered by the alleged wrongful repudiation of the new agreement. It cannot be said that all that the plaintiffs were applying to do is to make explicit what was implicit.

The application to amend the statement of claim has to be and is refused. The cost of this application will be paid by the plaintiffs.